Appeal No. 2005AP1492-CR **Cir. Ct. No. 2002CF1593**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS W. JOHNSON,

DEFENDANT-APPELLANT.

FILED

OCT 5, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Vergeront and Deininger, JJ.

This case involves whether time spent confined under a juvenile commitment should be awarded as sentence credit against an adult sentence. We certify this case because one of our prior decisions, ***State v. Thompson***, 225 Wis. 2d 578, 593 N.W.2d 875 (Ct. App. 1999), seemingly precludes reasonable resolution of this case, and only the supreme court can decide whether our prior decision should be overruled.

In ***Thompson***, we decided that the ***Beets*** sentence credit rule does not apply to confinement under a juvenile commitment because a juvenile commitment is not a "sentence."[1] Now, presented with circumstances different

[1] ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985).

from those in ***Thompson***, our decision in that case seems problematic and possibly inconsistent with basic sentence credit principles set forth in cases such as ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985). Unless there is a meaningful distinction for purposes of sentence credit between juvenile confinement and adult incarceration that we have not uncovered, it seems that either ***Beets*** or ***Thompson*** was wrongly decided.

At bottom, this is a question of statutory interpretation. Under the sentence credit statute, WIS. STAT. § 973.155 (2003-04),[2] should time spent in juvenile confinement under a juvenile commitment be treated the same as time spent serving a criminal sentence? As this case shows, if the answer is no, properly imposed criminal incarceration time will sometimes be wiped out by prior time in juvenile confinement, thus thwarting the goals the circuit court sought to achieve by imposing incarceration time.

We believe the issue in this case affects many defendants statewide. Here, although Johnson may have finished service of his initial incarceration, it appears resolution of the sentence credit question will affect how long he remains on extended supervision. Further, because this certification seeks reexamination of ***Thompson***, that common scenario is affected, namely, where a juvenile on "aftercare" parole commits an offense leading to both re-confinement as a juvenile and an adult prosecution and sentence.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Background

Johnson was adjudicated delinquent based on one count each of theft and disorderly conduct and two counts of battery. This adjudication eventually led to his commitment to a secure juvenile institution. While there, Johnson battered a fellow resident, fracturing his nose and knocking out two teeth. This offense eventually led to an adult criminal conviction for battery and the sentence that is at issue here.[3] Starting before the battery at issue here, Johnson engaged in misbehavior resulting in numerous conduct reports.

For reasons not apparent from the record, Johnson did not pursue his right to a speedy trial, and the prosecution did not move swiftly. From the time of the battery until sentencing in adult court, Johnson spent 617 days in secure juvenile institutions. At sentencing, the circuit court imposed eighteen months of initial confinement and four and a half years of extended supervision.

Johnson requested sentence credit for his 617 days in juvenile confinement after his battery, an award of credit that would have consumed the entire period of initial incarceration imposed by the court. The court denied sentence credit based on its finding that there was an extremely high probability that Johnson would have remained confined in a juvenile facility, regardless of the conduct underlying the battery.

[3] We refer to this battery simply as the "battery," which should not be confused with Johnson's juvenile adjudication, which also involved battery.

Discussion

Most sentence credit questions are resolved under a familiar two-pronged statutory test: first, was the time spent in "custody" and, second, if "custody," was the custody "in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1). The parties agree that all of the time Johnson seeks credit for was time in "custody" within the meaning of the statute because he was in a secure correctional facility. The sole question here is whether Johnson's custody was "in connection with the course of conduct for which sentence was imposed."

If Johnson's time in custody under a juvenile commitment was treated like a "sentence" for purposes of sentence credit, Johnson would not be entitled to the sentence credit he seeks. Under the reasoning of ***Beets***, service of Johnson's juvenile confinement would "sever[] the connection between the custody [the juvenile confinement] and the pending charges [here, the battery]." ***Beets***, 124 Wis. 2d at 383. To put this in statutory terms, Johnson's confinement time under a prior adjudication was not custody "in connection with" the "conduct for which [the new] sentence [is] imposed." WIS. STAT. § 973.155(1). In sum, under ***Beets***, Johnson would get "credit" for his time in custody against the juvenile commitment he was serving, but not against his subsequent adult sentence.

If writing on a clean slate, we would assess whether, for purposes of sentence credit, time in juvenile confinement under a juvenile commitment should be treated the same as time spent serving a criminal sentence. Stated differently, we would assess whether the ***Beets*** rule should apply. But that is not an option. As further explained below, in ***Thompson***, we decided that the ***Beets*** rule does not

apply to juvenile custody under a juvenile commitment because a juvenile commitment is not a "sentence."

In the sections below, we first address why the alternative to the ***Beets*** rule seems unworkable. We then discuss ***Thompson*** and suggest that its analysis does not support its conclusion.

The Alternative To ***Beets***: *The "But For" Test*

So far as we can discern, the only alternative to the ***Beets*** rule is the "but for" test advanced by the State. However, as exemplified by the facts in this case, the "but for" test will often be unworkable.

The "but for" test asks: "But for" the conduct for which the defendant seeks sentence credit, would the defendant find himself or herself in custody? Stated differently, would the defendant have been in the prior custody even if he had not engaged in the conduct underlying the sentence at issue?

As we understand this test, a high probability that the defendant would have been in the prior custody is not sufficient.[4] This understanding is based on language in ***Beets***. The ***Beets*** court explained that sentence credit may be denied only when there is *no relationship* between the prior custody and the conduct underlying the current sentencing:

> From that time on, Beets was in prison serving an imposed and unchallenged sentence; and whether he was also awaiting trial on the burglary charge was irrelevant, because his freedom from confinement—his right to be at liberty—*was not in any way related to the viability of the*

[4] For that matter, a "high probability" standard would itself appear to be problematic. But we need not explore that terrain in this certification.

> *burglary charge*. His ability to make bail on the burglary charge became immaterial….
>
> … While the statutory base is broader, there is no justification in the common law, and none expressed in the statute, affording a right to credit against confinement in criminal matters where the period of confinement *has nothing to do with* the matter for which sentence credit is sought.

Beets, 124 Wis. 2d at 379 (emphasis added); *see also* ***State v. Floyd***, 2000 WI 14, ¶17, 232 Wis. 2d 767, 606 N.W.2d 155 ("[A] factual connection fulfills the statutory requirement for sentence credit ….").

The ***Beets*** decision may appear self-contradictory. It seems to say that credit is due when there is a relationship between the prior custody and the conduct underlying sentencing, yet in ***Beets*** there was a clear relationship. Beets was on probation when he committed a burglary. His burglary conduct led to probation revocation, sentencing, and incarceration for his prior crime. ***Beets***, 124 Wis. 2d at 374-75. Thus, the burglary *was the primary reason* Beets commenced serving incarceration time on his prior sentence. However, when Beets was subsequently sentenced for that burglary, he did not get credit for the time. ***Id.*** at 376. The ***Beets*** court interpreted the sentence credit statute as imposing a simple rule: "sentencing on one charge severs the connection between the custody and the pending charges." ***Id.*** at 383.

Regardless whether ***Beets*** is self-contradictory, it has survived, to our knowledge, without serious challenge, for more than twenty years because it provides a sensible, workable rule. With limited exceptions not applicable here,[5]

[5] For example, the ***Beets*** rule does not apply "[w]hen a sentence is vacated and a new sentence is imposed upon the defendant for the same crime." WIS. STAT. § 973.04. In such instances, "the department shall credit the defendant with confinement previously served." ***Id.***

once it is determined that prior custody was time spent serving a sentence, the inquiry ends and no credit is due. The alternative is often a speculative endeavor. A court would need to determine what would have happened if a significant event had not occurred. In the juvenile context, a court must resolve whether and for how long a juvenile would have been in a juvenile facility if he or she had not committed the offense that led to adult sentencing. Resolving such questions will sometimes be possible,[6] but often a court will be left with mere speculation. The facts here exemplify the difficulty.

Here, Johnson's juvenile custody was not immediately affected by his battery conduct. Johnson was already in a secure juvenile institution and, therefore, was not placed in custody because of the battery. However, the pertinent "but for" inquiry is whether and for how long Johnson's *continued* juvenile custody was a result of his battery. The State answers this question as follows: Johnson's continued juvenile custody prior to sentencing was because of independent and antecedent conduct, not because of the conduct underlying the battery for which Johnson sought sentence credit. Thus, in the State's view, Johnson's battery conduct may have been one reason for his continued juvenile custody, but it also did not matter in the sense that Johnson would have remained in juvenile custody for the 617 days at issue here regardless of the battery. Neither the record nor the circuit court's findings bear this out.

[6] Indeed, the State tells us that ***Thompson*** provides an example of a case in which its "but for" test is satisfied. In the State's words: "'But for' the commission of the criminal offenses while on juvenile aftercare supervision, Thompson would not have found himself in physical custody in an adult jail."

The circuit court found there was an "extremely high probability" that Johnson would have remained in custody regardless of the battery. We stress that the court did not find that Johnson *would* have remained in custody. Rather, the court sensibly limited its finding to a "high probability." Indeed, it acknowledged that the "battery was one of a number of factors that [juvenile authorities] considered in maintaining its custody of [Johnson]."[7]

Moreover, the speculation inherent in the finding in this case is at the heart of the problem we perceive. To be sure, Johnson's stay in juvenile confinement was marked by repeat violations. The sentencing information before the circuit court showed that during a time period commencing before the battery and up until about six weeks before sentencing, Johnson accumulated 91 conduct reports with 220 charges.[8] But the sequence and timing of these violations was not described. Obviously, Johnson's severe unprovoked beating of another juvenile was a significant event in Johnson's pattern of misbehavior. So far as this record discloses, it is the only event that led to criminal charging. Could it be that, at some point, Johnson's battery *was* the primary reason juvenile authorities continued Johnson's custody? Finally, we note that no juvenile authority testified about the effect of Johnson's battery on his custody.

[7] Although the circuit court made this observation specifically with respect to the time period between the battery on June 3, 2002, and Johnson's transfer to a different juvenile institution on July 16, 2002, the court later clarified that its comment had "equal application to the entire period of [juvenile] incarceration."

[8] We acknowledge that the record contains some dates and numbers that do not seem to make sense. But for purposes of our discussion and certification, the discrepancies are not significant.

Our view is that the record does not support a finding that Johnson *would* have remained in custody for the 617-day period regardless of the battery conduct that led to his criminal charge. Therefore, Johnson could not be denied the sentence credit absent application of the ***Beets*** rule.

Our Decision In ***Thompson***

In ***Thompson***, this court was faced with whether we should treat time in juvenile custody pursuant to a juvenile commitment the same as time spent serving a sentence. Except for its juvenile context, the ***Thompson*** facts parallel those in ***Beets***.

Thompson was on juvenile "aftercare" parole when he committed three crimes that eventually led to his conviction and sentencing as an adult. As a result of his new crimes, Thompson's juvenile parole was revoked and he commenced serving a juvenile commitment in a secure juvenile institution. When Thompson was later sentenced as an adult, he sought credit for his time in the juvenile institution. The circuit court denied credit, but this court reversed.

We first concluded that ***Beets*** was not controlling because ***Beets*** involved the denial of prior time spent serving a sentence, and the prior juvenile commitment at issue in ***Thompson*** was not a "sentence." ***Thompson***, 225 Wis. 2d at 583-84. Of course this is true. A juvenile commitment is not a sentence. But that does not mean the reasoning of ***Beets*** does not apply. That issue is not plainly addressed in ***Thompson***.

In our text in ***Thompson***, we seemed to say that all that needed to be said about ***Beets*** was that ***Beets*** involved a "sentence," and a juvenile commitment was not a sentence. ***Thompson***, 225 Wis. 2d at 583-84. We included a footnote,

with an extensive quote from Thompson's brief. We apparently thought that Thompson's argument in the footnote explained why adult sentencing after revocation of probation or parole is not analogous to a juvenile commitment following revocation of aftercare. ***Id.*** at 584-85 n.2. But, at this time, it is not apparent why the quoted language from Thompson's brief supports the view that custody under a juvenile commitment should be treated differently for sentence credit purposes than custody serving a sentence. The quote from Thompson's brief notes that a juvenile in a secure facility, unlike an adult serving a sentence, might be returned to the community at any time and that an adult sentence, unlike a juvenile commitment, may be reduced by sentence credit. *See* ***id.*** at 584 n.2. These are differences, but there is no explanation as to why they matter for purposes of sentence credit analysis. Rather than question the reasoning in the lengthy quote, it is sufficient to say that we do not see anything in that quote that explains why the ***Beets*** rule should not apply.

We next stated in ***Thompson*** that Thompson's circumstances were comparable to those in ***State v. Baker***, 179 Wis. 2d 655, 508 N.W.2d 40 (Ct. App. 1993). However, at this time, we fail to see the relevance of ***Baker*** to the question presented in ***Thompson***. In ***Baker***, we concluded that defendants are entitled to sentence credit for time spent in juvenile detention awaiting waiver of juvenile jurisdiction against the sentence imposed for the conduct that led to the juvenile confinement. ***Baker***, 179 Wis. 2d at 659. This makes perfect sense. In the ***Baker*** scenario, nothing arguably severs the connection between the adult criminal sentence and the time spent in juvenile detention. Perhaps more to the point here, the award of credit in ***Baker*** was completely consistent with the credit that would have been awarded had Baker been treated as an adult from the start. Indeed, in ***Baker***, the State conceded that the denial of credit was error. ***Id.*** at 656-57.

We acknowledge that the result in ***Thompson***, *viewed in isolation*, seems to make sense. Thompson's time in juvenile confinement was clearly related to the conduct underlying his adult sentencing. Thus, the time seemingly meets the statutory "in connection with" test. The rub is that precisely the same sort of connection is not sufficient under ***Beets***. In distinguishing ***Beets***, we did not appear in ***Thompson*** to consider either the reasoning underlying ***Beets*** or the implications for the sort of scenario presented by the current case.

Thus, unless, for purposes of sentence credit, there is a meaningful distinction between prior juvenile custody and prior adult custody that we have not discerned, it seems that either ***Beets*** or ***Thompson*** was wrongly decided.

Conclusion

For the reasons above, we certify this appeal.